No. 03-20-00129-CV

IN THE THIRD COURT OF APPEALS
AUSTIN, TEXAS

QATAR FOUNDATION FOR EDUCATION, SCIENCE AND COMMUNITY DEVELOPMENT,

Appellant,

v.

KEN PAXTON, TEXAS ATTORNEY GENERAL, AND ZACHOR LEGAL INSTITUTE,

Appellees.

On Appeal from the 200th Judicial District Court of Travis County, Texas
Trial Court Cause No. D-1-GN-18-006240

APPELLEE ZACHOR LEGAL INSTITUTE'S BRIEF ON THE MERITS

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ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

This appeal concerns an issue of first impression and important, even fundamental, substantive and procedural matters concerning the Texas Public Information Act. Zachor Institute believes oral argument would assist the Court in analyzing and resolving these issues.

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Because the trial court heard this case on cross motions for summary judgment, there was no evidentiary Reporter's Record.

STATEMENT OF THE CASE

Nature of the Case:	This is a Texas Public Information Act (TPIA) case.
Agency Proceeding:	Zachor Legal Institute submitted a request under the TPIA for information on the funding and donors from the government of Qatar and its subdivisions to Texas A & M University, related to the Qatar campus of the University (TAMUQ). Texas A & M opposed disclosure only of the identities of the donors, but not the required disclosure relating to gifts, grants, and donations. Qatar Foundation, a private entity, submitted objections to the disclosure based on an alleged competitive advantage.
Agency's Disposition:	In the only letter ruling at issue in the underlying lawsuit, the Texas Attorney General opined that Texas A & M could withhold only the donors' identifying information. (CR 112-113, Tex. Att'y Gen OR2018-20240 (August 14, 2018))
Trial Court Proceeding:	The Qatar Foundation filed suit challenging the Attorney General's opinion that the majority of the requested public information must be released. Texas A & M did not pursue its position in the trial court and was never a party in the litigation. Qatar did not name Texas A & M as a party. (CR 4-8) The Zachor Legal Institute and Qatar Foundation filed motions for summary judgment on the merits; and Zachor also challenged the subject matter jurisdiction of the trial court because the PIA does not provide a waiver of sovereign immunity for the Foundation's lawsuit. (CR 28-29, 445-452, 459-469)
Trial Court's Disposition:	The Honorable Karin Crump, Presiding Judge of the 200th Judicial District Court of Travis County, Texas granted Zachor's plea to the jurisdiction and dismissed plaintiff's claims, leaving the Attorney General's opinions intact. (CR 488)

ISSUE PRESENTED

Qatar Foundation filed suit against the Attorney General of the State of Texas to prevent disclosure of a public university's information pursuant to the Texas Public Information Act. The trial court held it did not have jurisdiction to decide the matter. Does a trial court have subject-matter jurisdiction over a private litigant's suit against the Texas Attorney General to prevent disclosure of public information under the TPIA when the governmental body (Texas A & M University), that is subject to the TPIA's duties and holder of the public information, is not a party to the lawsuit?

INTRODUCTION

Appellee Zachor Legal Institute files this response brief and seeks affirmation of the trial court decision dismissing the Qatar Foundation's claims.

The Texas Public Information Act, Tex. Gov't Code §§ 552.001, *et seq*.,[1] protects the entitlement of the people "at all times to complete information about the affairs of government." § 552.001. The people "insist on remaining informed so that they may retain control over the instruments they have created," including their public universities. *See id*. This fundamental philosophy guides the analysis in this dispute over disclosure of the donors to Texas A&M University related to its campus in the country of Qatar. *See* Appendix B, PIA Request.

The Texas Attorney General opined that the requested public information from Texas A&M must be released, except for the identifies of the donors and information that would put the University at a competitive advantage. The Qatar Foundation filed suit against the Texas Attorney General seeking to keep this information secret, but never joined the target of the PIA request, Texas A&M. The requestor, Zachor Legal Institute,

[1] All citations to statutory provisions are to the Texas Public Information Act, Tex. Gov't Code, unless otherwise stated.

intervened and noted, accordingly, that the trial court does not have subject-matter jurisdiction of the Foundation's suit. The State of Texas, including the Office of the Attorney General, is protected by a powerful common law doctrine–sovereign immunity. Immunity bars Qatar's lawsuit because the legislature did not give clear and unambiguous consent in the PIA to the suit, without which the trial court did not have jurisdiction to hear the case.

To be clear, Zachor does not contend that third parties may never file a lawsuit to challenge the disclosure of public information alleged to be proprietary or that they cannot assert their position to the Attorney General, as Qatar did here. Rather, this case is about whether the Qatar Foundation may sue the Attorney General without a legislative waiver of immunity that could have be satisfied by naming the governmental body, Texas A&M University, in the suit. *Compare* § 552.324(a) *with* § 552.325 (the provision that Qatar contends waives immunity). Qatar erroneously claims the trial court had jurisdiction over its suit when it failed to name the target of the PIA request and the only entity that has the legal duty of disclosure under the Texas PIA, is a governmental body under the PIA, was a necessary party in the trial court (but never made an appearance), and to which a trial court order must be directed for compliance with the PIA's

disclosure requirements. The Qatar Foundation is none of these, which is why the trial court wisely dismissed the lawsuit.

STATEMENT OF FACTS

A. *The Public Information at Issue.*

The underlying merits of this case concern a foreign entity's financial influence on Texas A&M University, a public university, through secret funding.

Texas A & M University was created by the Texas Legislature in 1971. Tex. Const. Art. 7, § 13. Article 7, section 13, of the Texas Constitution made Texas A & M a branch of the University of Texas with access to the Permanent University Fund. Article 7, section 18 (a)(1)-(10), lists the component institutions of the Texas A & M System. Subsection (c) of section 18 provides that additional educational institutions may be created by the legislature as part of the Texas A & M University System. Tex. Const. Art. 7, § 18 (c).

TAMUQ is a degree-conferring academic branch of Texas A & M University located in Education City in Qatar. (CR 175-176). Texas A & M University and the Qatar Foundation established TAMUQ in 2003. (CR 175, 214). Unlike other campuses in the system, no general, or special, law created TAMUQ. *See generally* TEX. EDUC. CODE §§ 87.001 *et seq*. (Other Academic Institutions in the Texas A & M University System); §§ 88.001 *et*

seq. (Agencies and Services of the Texas A & M University System). TAMUQ was established by a contract or contracts between Texas A & M University and the Qatar Foundation. (CR 212, paragraphs 6-8). According to the Qatar Foundation, its grants "support A&M's Qatar campus." (CR 126).[2]

Zachor's TPIA request sought information about funding, donors, and donations received by Texas A&M "from the government of Qatar and/or agencies and subdivisions of the government of Qatar." (CR 106-109). The merits involve whether the fact of, the amount of, and the conditions on foreign funding of Texas A&M research and programs can be, as a matter of law, anonymous, a "trade secret," or part of any confidential competitive bidding.

The public has a substantial interest in knowing what Qatar paid for Texas A&M programs here and abroad in order to establish Qatar's own degree-conferring Texas A&M campus in Qatar (called "TAMUQ"). TAMUQ was not created by the Texas Legislature, but it carries Texas A&M's name, affects its reputation, and to some extent relies on Texas public resources.

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[2] The Qatar Foundation was founded by the Sheikh and Sheikha of Qatar and is at least partially funded by the Qatar government. (CR 245, response to questions 8-10)). However, the Foundation is a private entity and is not a governmental body under the PIA.

Although requestors are entitled to public information and need not justify their requests, §552.222(a), public information related to TAMUQ helps illuminate the contractual obligations attached to such payments, who owns the results of research and newly developed technology at TAMUQ, whether the same academic standards apply to degrees conferred in Qatar, and whether the same religious, political, and anti-discrimination freedoms apply at the TAMUQ campus as would apply in Texas.[3]

It is no secret that Qatar provides substantial funds to Texas A&M and supports TAMUQ. The Qatar briefing to the Attorney General acknowledges that Qatar donates to Texas A&M "based on the value of the campus's research programs to the Qatar Foundation's mission." (CR 75; Exhibit 7, attachment A). Qatar did not specify what that Qatar "mission" includes. It is clear, however, that there is nothing anonymous about Qatar's donations.

B. *Zachor's May 23, 2018 TPIA request.*

On May 23, 2018, Zachor submitted to Texas A&M University in College Station, Texas a TPIA request for:

> A summary of all amounts of funding or donations received by or on behalf of the University from the government of Qatar

[3] United States government reports have identified the Qatari government as a vocal purveyor of anti-Semitism, as well as a promoter of radical extremist Islamic terrorist groups. (CR 166 Exhibit 9)).

> and/or agencies or subdivisions of the government of Qatar between January 1, 2013 and May 22, 2018.

(CR 12-14). Zachor updated the request on May 24, 2018. (CR 14).

By letter dated June 7, 2018, Texas A&M sought an open records decision from the Texas Attorney General regarding whether the requested information is excepted from public disclosure under § 552.1235 of the TPIA, which protects the identity of private donors who wish to remain anonymous. (CR 110-111). In response, the Attorney General issued Tex. Att'y Gen. OR2018-20240 (August 14, 2018). (CR 112-113). The Attorney General ruled, "[T]he university must withhold the donor's identifying information, which you marked under section 552.1235 of the Government Code. The university must release the remaining information." *Id.* This decision was the subject of the underlying lawsuit.

C. *The Qatar Foundation lawsuit.*

On October 12, 2018, Qatar filed the underlying lawsuit against the Attorney General, claiming that almost all the information concerning foreign government funding of and donations to Texas A&M is excepted from disclosure under not only section 552.1235, but also section 552.110. (CR 7; Petition at ¶ 14). In this Court, Qatar adds for the first time TPIA section 552.104, which protects competing bids on government contracts but only up until the time the bids are opened and the contract is awarded.

See Tex. Att'y Gen. ORD -506 (1988); ORD - 306 (1982); and ORD - 170 (1977). The Attorney General filed its answer on November 13, 2018. (CR 24-26). Zachor filed its intervention on April 29, 2019. (CR 27-81).

The parties' cross motions for summary judgment were set for December 17, 2019. (CR 317-318). When Zachor raised its jurisdictional challenge, the court kept the record open to allow responses. The Attorney General filed a response. (CR 454-458).

It is undisputed that Texas A&M did not file or intervene in this lawsuit. (CR 338). It is also undisputed that Qatar did not name Texas A&M as a party, either as a defendant or as an involuntary plaintiff. (CR 4-8). Finally, it is apparent from the absence of any request in the that Qatar did not seek leave to add Texas A&M as a party after Zachor raised a challenge to the trial court's jurisdiction.

For jurisdiction to brings its claims against the Attorney General, Qatar relied on section 552.325 of the Texas Public Information Act (TPIA), Tex. Gov't Code §§ 551.001 *et seq*., and on the court's "inherent power to regulate the ultra vires acts of government agencies." (CR 5).[4]

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[4] The Qatar Foundation suggests for the first time in this Court additional grounds for jurisdiction—a direct privacy claim under section 552.1235 of the TPIA. (Qatar Brief, p. 18, n. 2). The Qatar Foundation did not plead such a claim. In addition, that argument would fail because section 552.1235 is not listed as a privacy exception in section 552.305; because the TPIA exceptions do not create new privileges, *see*

SUMMARY OF THE ARGUMENT

To waive governmental immunity, a statute must use "clear and unambiguous language" expressing that intent. Litigants must follow all statutory conditions or limits included in such waivers. If they fail to do so, the courts lack subject matter jurisdiction over the lawsuit.

Section 552.324 of the TPIA expressly authorizes a governmental body to bring suit to challenge an adverse open records decision of the Attorney General. Section 552.325 of the TPIA describes the parties for such lawsuits and prohibits the governmental body from suing the person who requested the information under the TPIA unless that person elects to intervene in the lawsuit. Section 552.325, the only provision of the TPIA upon which Qatar relies for jurisdiction, is not a clear and unambiguous waiver of sovereign immunity that allows a private party such as the Qatar Foundation to sue the Attorney General to challenge an open records decision.

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§ 552.005(b); because the Qatar Foundation has publicized the fact that it grants funds to Texas A&M; because the TPIA does not authorize the creation of new exceptions by governmental bodies by agreement, *see Indus. Found. of the S. v. Tex. Indus. Accid. Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert denied*, 430 U.S. 931 (1977); because disclosure is required by federal law, *see* 20 U.S.C. § 1011f and CR 179 (federal notice to Texas A&M about Qatar Foundation); and because the Qatar Foundation failed to name the only party that could potentially release the information at issue, Texas A & M University.

The phrase "or other person or entity that files a suit" in section 552.325(a) and (b) is not a waiver of sovereign immunity that authorizes a private party to sue the Attorney General to prevent the release to the public of information alleged to be proprietary, at least not without the governmental body that holds the information. Section 552.325(a) does not include the unambiguous waiver of immunity in Section 552.324(a) that the "only suit a *government body* may file seeking to withhold information from a requestor" is a suit in Travis County district court "against the attorney general." § 552.324 (emphasis added). Although "other person or entity" is mentioned in Section 552.325(a), it likely references suits for declaratory judgment or injunctive relief pursuant to section 552.3215 rather than establishing a clear and unequivocal authorization to sue the Attorney General. Appellant's argument is similar to the argument made in *Tooke v. City of Mexia*, 197 S.W.3d 325, 342 (Tex. 2006), that because a statute referenced "sue and be sued", it was a waiver of immunity. The Supreme Court rejected that position. *Id.* In fact, the Attorney General's Public Information Act Handbook 2018 acknowledges this very position stating that a "third party must still meet jurisdictional requirements for standing before it may file suit over a ruling that orders information to be disclosed." OFF. ATT'Y GEN., PUBLIC INFORMATION ACT HANDBOOK 2018 43,

https://www.texasattorneygeneral.gov/sites/default/files/2018-06/PIA_handbook_2018_0.pdf; *see also* OFF. ATT'Y GEN., PUBLIC INFORMATION ACT HANDBOOK 2020 43, https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/publicinfo_hb.pdf (same). Waiver of immunity, like standing, implicates subject-matter jurisdiction. *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 96 (Tex. 2012).

Contrary to Qatar's contention, the Texas Supreme Court decision in *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), is not controlling. In *Boeing*, no party challenged jurisdiction. As a result, the Court was not called upon to determine whether the language "or other person or entity that files a suit" is a clear and unambiguous waiver of sovereign immunity. Moreover, in *Boeing*, the governmental body that held the information Boeing sought to protect was a party to the lawsuit. As indicated, under section 552.324, a governmental body may file a lawsuit against the Attorney General to challenge an open records decision with which it disagrees. The *Boeing* Court simply did not address whether the TPIA waives immunity to allow a private party in Boeing's position to seek relief *solely* against the Attorney General.

The fact that the Attorney General agreed that the Qatar Foundation could maintain the underlying lawsuit is also not controlling. The Attorney General may not waive sovereign immunity by consent because it would be a usurpation of the Texas Legislative's prerogative in violation of the constitutional separation of powers provision. It would also run afoul of section 402.004 of the Texas Government Code, which provides expressly that the Attorney General may not waive the state's immunity.

Qatar alleged *ultra vires* acts as an alternate ground for jurisdiction. The Attorney General, however, clearly has the authority to issue legal opinions under the TPIA on whether particular information falls within the TPIA's exceptions to disclosure. The fact that Qatar may believe that an open records decision is wrong does not establish a proper *ultra vires* claim under *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009).

The only relief Qatar could obtain against the Attorney General in this case would be purely advisory. First, although the legal opinions issued by the Attorney General under the TPIA are entitled to be given "great weight" by the courts, they are purely advisory and do not bind the parties. Second, the Attorney General is prohibited by the TPIA from releasing information submitted for his review. For these reasons, the only judgment a court could issue against the Attorney General would be purely advisory. Qatar

Foundation is not a governmental body under the TPIA, it has no duty of disclosure in Texas, and it was not the target of the TPIA request. The courts lack the jurisdiction to issue purely advisory decisions.

To grant the relief requested by Qatar, Texas A & M must be a party, voluntarily or involuntarily.

Under Texas Rule of Civil Procedure 39, Texas A&M is an indispensable party to a lawsuit to prevent the disclosure of information held by Texas A&M. Under section 552.201 of the TPIA, the chief administrative officer of a governmental body is the "officer for public information" with the duty to comply with the TPIA, including producing or withholding information and seeking an opinion from the Attorney General under section 552.301 of the TPIA. Only a judgment against Texas A&M would have afforded the Qatar Foundation the relief it sought.

ARGUMENT

I. Standard Of Review And Tenets Of Sovereign Immunity.

Sovereign immunity deprives a trial court of subject matter jurisdiction for lawsuits in which the state or certain governmental units have been sued unless the state consents to suit. *See Tex. Parks & Wildlife Dep't. v. Miranda,* 133 S.W.3d 217, 224 (Tex. 2004) *cited by Wilson v. Cmty. Health Choice Tex., Inc.*, No. 03-20-00153-CV, __ S.W.3d __, 2020

WL 4726590, at *4 (Tex. App.—Austin Aug. 14, 2020, no pet. h). Lack of subject matter jurisdiction may be raised by a plea to the jurisdiction.

Whether a court has subject matter jurisdiction is a question of law, which is reviewed on appeal de novo. *Id.*, at 225-226; *Wilson*, at *4. And interpreting the relevant provisions of the PIA is a matter of statutory construction, which is a question of law that is reviewed de novo on appeal. *Wilson*, 2020 WL 4726590, at *5 (*citing First Am. Title Ins. v. Combs*, 258 S.W.3d 627, 632 (Tex. 2008)).

Such a challenge begins with analysis of the plaintiff's live pleading. *Id.* at *4. The plaintiff has the initial burden of alleging facts that affirmatively demonstrate jurisdiction. *Id.* (*citing Miranda*, 133 S.W.3d at 225–226). "[T]he suit should be dismissed" if the pleadings and the record "conclusively negate the existence of jurisdiction." *Rusk*, 392 S.W.3d at 96.

The initial burden is on a plaintiff to plead the basis for jurisdiction. *Creedmoor-Maha Water Supply Corp. v. Tex. Comm'n on Env'l Qual.*, 307 S.W.3d 505, 512–513 (Tex. App—Austin 2010, no pet.). Qatar's petition named only the Attorney General, not Texas A & M University, as a party. (CR 4-21). Qatar relies on section 552.325 of the Texas Public Information Act (TPIA), Tex. Gov't Code §§ 552.001 *et seq.*, and on the court's "inherent

power to regulate the *ultra vires* acts of government agencies." (CR 5). Qatar did not rely on or follow the procedures set forth in section 552.3215.

Zachor responded that section 552.325 did not waive immunity for a lawsuit to prevent the disclosure of information alleged to be proprietary held by Texas A & M University by filing a lawsuit solely against the Attorney General. (CR 28-29). The trial court did not state the basis for the dismissal, other than the lack of jurisdiction. (CR 488).

II. The Qatar Foundation Cannot Demonstrate A Clear And Unambiguous Waiver Of Immunity.

A. *Sovereign immunity and jurisdiction.*

The doctrine of sovereign immunity prohibits suits against the state unless the state consents and waives its immunity. *See Hall v. McRaven,* 508 S.W.3d 232, 238 (Tex. 2017). Sovereign immunity from suit "implicates a court's subject-matter jurisdiction," *Engelman Irrigation Dist. v. Shields Bros., Inc.*, 514 S.W.3d 746, 755 (Tex. 2017), because it recognizes "the courts' limited authority over the sovereign creating them." *Hall*, 508 S.W.3d at 238.

Sovereign immunity is a common-law doctrine that is ultimately within the Texas Supreme Court's province to modify or even abrogate. *See Texas Dep't of Crim. Justice v. Miller*, 51 S.W.3d 583, 592–593 (Tex. 2001) (Hecht, J., concurring). The Texas Supreme Court, however, ordinarily

defers to the Texas Legislature to decide to waive immunity. *Engelman,* 514 S.W.3d at 753; *State v. Oakley*, 227 S.W.3d 58, 62 (Tex. 2007). The rationale for deferring is that the legislature is better suited to weigh the public-policy considerations that bear upon whether to waive sovereign immunity. *See City of Round Rock v. Whiteaker*, 241 S.W.3d 609, 626–627 (Tex. App.—Austin 2007, pet. denied); *see also City of Galveston v. State*, 217 S.W.3d 466, 469 (Tex. 2007) (waiver of immunity "depends entirely upon statute"). There exists a "heavy presumption in favor of immunity." *City of Galveston*, 217 S.W.3d at 469.

To waive governmental immunity, a statute must use "clear and unambiguous language" expressing that intent. *Hillman v. Nueces County*, 579 S.W.3d 354, 360 (Tex. 2019) (citing *Mexia*, 197 S.W.3d 325, 328–329 (Tex. 2006) and TEX. GOV'T CODE § 311.034 ("[A] statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language.")); *State v. Oakley*, 227 S.W.3d at 62 (quoting TEX. GOV'T CODE § 311.034).

When deciding whether a statute clearly and unambiguously waives governmental immunity, the *Hillman* court stated that the courts must

> (1) consider "whether the statutory provisions, even if not a model of clarity, waive immunity without doubt;"

> (2) resolve any "ambiguity as to waiver . . . in favor of retaining immunity;"
>
> (3) generally find waiver "if the Legislature requires that the [governmental] entity be joined in a lawsuit even though the entity would otherwise be immune from suit;"
>
> (4) consider whether the legislature "provided an objective limitation on the governmental entity's potential liability"; and
>
> (5) consider "whether the statutory provisions would serve any purpose absent a waiver of immunity."

Hillman, 579 S.W.3d at 360 (citing *Harris Cty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 844 (Tex. 2009)).

B. *TPIA Section 552.325 is a limited waiver of immunity that does not provide consent for a private party, which is neither a governmental body nor subject to public duties under the TPIA, to sue the Attorney General.*

1. Section 552.325

Qatar relies on the following emphasized language in section 552.325, which provides in full as follows:

> (a) A governmental body, officer for public information, or *other person or entity that files a suit seeking to withhold information from a requestor* may not file suit against the person requesting the information. The requestor is entitled to intervene in the suit.

§ 552.325 (emphasis added).

At issue is whether this vague reference to "other person or entity that files a suit" clearly and unambiguously waives the sovereign immunity of the Attorney General. Section 552.325 expressly waives immunity for and

allows a *requestor* to sue: "The requestor is entitled to intervene in the suit." In fact, section 552.325 is all about the requestor – the notice that must be given, the time allowed to intervene, etc. *Id.* No similar language applies to third parties *opposing* disclosure.

In *Mexia*, the Texas Supreme Court reiterated the principle that "no state can be sued in her own courts without her consent, and then only in the manner indicated in that consent." 197 S.W.3d at 331 (quoting *Hosner v. De Young,* 1 Tex. 764, 769 (1847)). In *Mexia* plaintiffs relied on language in section 51.075 of the Local Government Code that the city may "plead and be impleaded." *Id.* at 342. In a landmark decision, the Court held that such clauses, like "sue and be sued",

> [r]ead in context, . . . sometimes waive governmental immunity from suit, sometimes do not, and sometimes have nothing whatever to do with immunity, referring instead to the capacity to sue and be sued or the manner in which suit can be had (for example, by service on specified persons). Because immunity is waived only by clear and unambiguous language, and because the import of these phrases cannot be ascertained apart from the context in which they occur, we hold that they do not, in and of themselves, waive immunity from suit.

Id. at 328–329.

In *Kirby Lake Dev. Ltd., v. Clear Lake City Water Auth.*, 320 S.W.3d 829 (Tex. 2010), the Court analyzed two statutes that residential developers relied on for jurisdiction to sue the water authority. The first statute,

section 49.066 of the Texas Water Code contained "sue and be sued" language and also the phrase that "[a] suit for contract damages may be brought against a district only on a written contract of the district approved by the district's board." *Id.* at 837 (quoting from TEX. WATER CODE § 49.066(a)). The Court found that this language was not a clear and unambiguous waiver of immunity. *Id.* at 838. Rather, it was a condition precedent if a lawsuit for contract damages was otherwise authorized. *Id.* at 837.

The second statute considered in the *Clear Lake* case, section 271.152 of the Local Government Code contained the following language:

> A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract[.]

Id. at 838 (quoting TEX. LOC. GOV'T CODE § 271.152) The Court found the language in section 271.152 to be a clear and unambiguous waiver of sovereign immunity as to the contract claims specified. *Id.* at 840.

The language in TPIA section 552.325 at issue here, "other person or entity that files a suit," is like the "sue and be sued" language at issue in *Mexia* and the condition precedent language "a suit for contract damages may be brought against a district only on a written contract of the district approved by the district's board" at issue in *Clear Lake*. Section 552.324

expressly authorizes governmental bodies to file lawsuits to challenge an adverse decision of the Attorney General, and section 552.325 authorizes the TPIA requestor to intervene in such lawsuits, but otherwise, section 552.325 merely describes how the waiver of immunity in section 552.324 is to be exercised. The language must be interpreted in the context of section 552.324.

2. TPIA section 552.325 must be read in context with TPIA section 552.324.

When the Texas Legislature intended to waive immunity in the TPIA, it did so clearly. Section 552.324 is a clear waiver of immunity that expressly authorizes a governmental body to file a lawsuit against the Attorney General but also provides explicit limits on the lawsuit:

> (a) The only suit a governmental body may file seeking to withhold information from a requestor is a suit that:
>
> > (1) is filed in a Travis County district court against the attorney general in accordance with Section 552.325; and
> > (2) seeks declaratory relief from compliance with a decision by the attorney general issued under Subchapter G.
>
> (b) The governmental body must bring the suit not later than the 30th calendar day after the date the governmental body receives the decision of the attorney general determining that the requested information must be disclosed to the requestor. *If the governmental body does not bring suit within that period, the governmental body shall comply with the decision of the attorney general.* If a governmental body wishes to preserve an affirmative defense for its officer for public information as

> provided in Section 552.353(b)(3), suit must be filed within the deadline provided in Section 552.353(b)(3).

§ 552.324 (emphasis added). Here, the governmental body, Texas A & M, did *not* file a lawsuit and now has a ministerial duty to release the information the Attorney General ordered disclosed in the first TPIA decision, the only decision at issue in the underlying lawsuit.

The language of Sections 552.324 and 552.325 make clear that the Texas Legislature knew how to waive immunity when it chose to do so, but did not do so to allow any private entity to sue the Attorney General because they may claim an interest in public information. It could have provided similar authority for third parties whose privacy or property interests were implicated, but it did not. Instead, it afforded such third parties *only* the opportunity to submit comments to the Attorney General opposing release of requested information. *See* §§ 552.304, 552.305. That is not the same thing as authorizing a lawsuit. The Texas Legislature also afforded an alternate remedy with section 552.3215, a remedy that Qatar did not pursue.

3. TPIA section 552.325 must be read in context with TPIA section 552.3215 and the necessary party joined to comply with the mandates for waiver of immunity.

TPIA section 552.3215 provides a remedy for those "claiming to be a victim of a violation of this chapter [chapter 552, the TPIA]." § 552.3215. Section 552.3215 provides as follows:

> (b) an action for a declaratory judgment or injunctive relief may be brought in accordance with this section *against a governmental body* that violates this chapter.

§ 552.3215 (emphasis added). Violations of the TPIA include a failure to release public information, section 552.353, and an improper release of confidential information. § 552.352.

In *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 554 (Tex. 2019), the Texas Supreme Court held that the waiver of immunity in the Texas Open *Meetings* Act is limited to mandamus and injunctions, or both, and does not include declaratory judgments. In analyzing the scope of the waiver, the Court contrasted the TPIA, noting that section 552.3215 is an express waiver of immunity to seek a declaratory judgment or injunctive relief against a governmental body that violates the TPIA. *Id.* at 554; *see ICON Benefit Adm'rs II, L.P. v. Abbott,* 409 S.W.3d 897, 901 (Tex. App.—Austin 2013, pet denied) (third party seeking to prevent disclosure sued both Attorney General and the governmental body that held the

information, the City of Lubbock, and relied on both sections 552.3215 and 552.325). Qatar did not avail itself of the remedy provided in section 552.3215.

Section 552.3215 specifies that general civil enforcement lawsuits must be against the offending governmental body. Section 552.3215 does not authorize a case *against* the Attorney General.[5] In fact, the Attorney General may be one of the parties to file a lawsuit under section 552.3215.

4. The legislative history for section 552.325 supports the conclusion that it contemplates limits on who a governmental body may sue.

The Attorney General asserts that the text and title to section 552.325 must contemplate that third parties will file lawsuits under section 552.325 (Attorney General's Brief, pp. 3-5).[6] The legislative history for section 552.325, however, shows that its purpose was to prevent lawsuits against requestors:

> This legislation was prompted by an incident in which the parent of a student requested information regarding a teacher's evaluations of

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5 Even if this Court were to conclude Section 552.3215 allows for a suit against the Attorney General, Qatar did not bring a claim pursuant to that section. Qatar only sued the Attorney General pursuant to section 552.325 and unspecified "ultra vires" claims. (CR 5). That is insufficient. *See supra* note 4.

6 The Attorney General also designates himself as the "Real Party in Interest." The only interest the Attorney General has, however, is that of having a purely advisory opinion reviewed. He did not seek the information at issue and has no duty to release information. The real parties in interest are the requestor and the governmental body from whom the information is requested.

> his child. After an unfavorable ruling by the Attorney General's Office, the [school] district sued the parent to establish the confidentiality of the records. The requestor of a public record should never have to defend such a case.

H. Research Org., Bill Analysis, Tex. H.B. 1718, 74th Leg., R.S., 5 (1995); see Appendix F

The text of section 552.325 supports the conclusion that it was intended to limit those who could become parties to a lawsuit filed under the section. The governmental body and the Attorney General are the only two parties to such a lawsuit, unless the requestor elects to intervene. The purpose of section 552.325 was not to allow just any party to sue the Attorney General.

C. *The Boeing case did not address whether the Texas Legislature intended section 552.325 broadly to waive immunity for suits by private parties against the Attorney General.*

1. **The facts of the *Boeing* decision distinguish it from this case.**

The Texas Supreme Court decision *Boeing* simply did not conduct the kind of analysis of the language and context of section 552.325 that was conducted in cases like *Mexia* and *Clear Lake*. Moreover, in *Boeing,* no party challenged jurisdiction. In addition, the governmental body, that does have authority to sue the Attorney General under TPIA section 552.324, was, unlike here, a party in that case. As a result, the Court was not called

upon to determine whether the language "or other person or entity that files a suit" is a clear and unambiguous waiver of sovereign immunity that allows a private party in Boeing's position to seek relief *solely* against the Attorney General.[7] Zachor maintains that the issue has not been resolved by *Boeing*.

In *Boeing,* the language regarding section 552.325 is incidental to its ruling that private parties opposing disclosure may raise the applicability of exception 552.104, the competitive bidding section. 466 S.W.3d at 837–838. For example, the Court states:

> [t]he government, however, gathers a great deal of information from people and companies doing business in Texas, and some requests may also implicate the privacy or property interests of third parties. When a citizen's request involves this type of information, the PIA permits the third party to raise the issue and any applicable exception to the information's disclosure with the Attorney General, *or in district court, or both. See id.* § 522.305(b) (permitting person whose privacy or property interests are implicated to appear in the Attorney General's administrative determination of the request); *id.* § 552.325 (*recognizing third party's right to file suit seeking to withhold information from a requestor). The Boeing Company is such a third party here.*

Id. at 833 (emphasis added).

The central issue in the *Boeing* case was whether Boeing had standing to assert the applicability of section 552.104, the competitive bidding

[7] The Attorney General acknowledged in the trial court, the issue of third party standing under section 552.325 was not squarely at issue in the Texas Supreme Court's decision in *Boeing*. (CR 456; Attorney General Response to Plea, p. 3).

exception, not whether Boeing had standing to sue in the first place. *See generally, id.* For many years, the Attorney General had ruled that only governmental bodies could raise the exception. *See id.* at 835–836. Boeing attempted to raise the exception in the process of submitting comments to the Attorney General under section 552.305 of the TPIA, but the Attorney General refused to apply the exception. *Id.* The Texas Supreme Court rejected that position. *Id.* at 839

In addition, in *Boeing*, there was no reason to challenge jurisdiction because Boeing had joined both the governmental body, the Port Authority, and the Attorney General in the lawsuit. *See id.* at 835. The Port Authority was clearly aligned with Boeing. *See id.* at 837, 838.

It is well established that once it is shown that one party has standing, the courts have jurisdiction. As a general rule, courts analyze the standing of each individual plaintiff to bring each individual claim he or she alleges. *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 77 (Tex. 2015). When there are multiple plaintiffs in a case who seek injunctive or declaratory relief, however, the court need not analyze the standing of more than one plaintiff—so long as one plaintiff has standing to pursue as much or more relief than any of the other plaintiffs. *Id.* "The reasoning is fairly simple: if one plaintiff prevails on the merits, the same prospective relief

will issue regardless of the standing of the other plaintiffs." *Id.* at 77–78 (citations omitted). In *Boeing*, the Port Authority had standing under sections 552.324 and 552.325 to challenge the Attorney General's decision.

In *Town of Shady Shores*, a case addressing the scope of the waiver of immunity in the Texas Open Meetings Act (TOMA), Tex. Gov't Code §§ 551.001 *et seq.*, the Court considered the impact of its previous conclusions. 590 S.W.3d at 555. In a number of prior cases the Court had affirmed or rendered declaratory judgments premised on violations of the TOMA. *See Smith Cty. v. Thornton,* 726 S.W.2d 2, 3 (Tex. 1986) (affirming the part of the court of appeals' judgment declaring commissioners court orders to be of no force or effect); *Cox Enters., Inc. v. Bd. of Trs. of Austin Indep. Sch. Dist.*, 706 S.W.2d 956, 960 (Tex. 1986) ("Declar[ing]" that the AISD violated the TOMA). The Court stated:

> While *Thornton* and *Cox Enterprises* in effect conclude that declaratory relief is available under the Open Meetings Act, in those cases we simply were not presented with, and did not address, the specific question of whether the Act waives immunity from suit for such relief. We therefore do not view those opinions as dispositive of the issue.

Town of Shady Shores, 590 S.W.3d at 555 (footnote omitted).

For similar reasons, the decision in *Boeing* simply does not compel the conclusion urged by Qatar. *Boeing* did not conduct the kind of analysis

of the language and context of section 552.325 that was conducted in cases like *Mexia, Clear Lake,* and *Town of Shady Shores.*

2. The "legislative acceptance" doctrine does not override the need for a clear and unambiguous waiver of immunity.

Qatar argues that the "legislative acceptance" doctrine constitutes the Texas Legislature's approval of the holding in *Boeing*. (Qatar Brief, pp. 20-21). Under the doctrine, the legislature is presumed to have, by not changing a provision in response to the courts' or an administrative agency's long-standing construction, accepted that construction. *See Tex. Dep't of Prot. & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 176 (Tex. 2004). The doctrine applies only when the relevant statutory provision has been interpreted by a court of last resort or given a longstanding construction by a proper administrative officer. accepted that construction. *Id.* at 196.

Qatar urges this Court to apply the doctrine here because the Texas Legislature modified TPIA section 552.104 in response to the *Boeing* case but did not amend TPIA section 552.325. (Qatar Brief, p. 20). In *Mosley v. Tex. Health and Human Servs. Comm'n*, 593 S.W.3d 250, 261–262 (Tex. 2019), the Court addressed a similar argument. The *Mosley* Court declined to apply the legislative acceptance doctrine in a situation in which the

legislature revised some provisions of chapter 48 of the Human Resources Code but left the sections concerning the finality of orders necessary to obtain judicial review untouched. *Id.* at 261–262.

Appellants misconstrue legislative acceptance. The *Boeing* opinion is consistent with section 552.325. No legislative change in section 552.325 was necessary because, as stated in section above, the courts had jurisdiction over that action because the governmental body that was the holder of the information, the Port Authority of San Antonio, was also sued, as required.

The "legislative acceptance" doctrine, moreover, is legislation by negative implication that is inconsistent with the requirement that waivers of immunity must be clear and unambiguous. For that reason alone, the cases relied on by Qatar are inapposite. (Qatar Brief, p. 20, citing *Utts v. Short*, 81 S.W.3d 822 (Tex. 2002) and *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182 (Tex. 1968)). Both of those decisions were wrongful death cases that did not involve governmental defendants or the question of a waiver of immunity.

III. There Is No "Settled Body Of Law" That Supports Qatar's.

Qatar lists eight cases and asserts that accepting Zachor's position would ignore a "settled body of law" that interprets TPIA section 552.325 to

waive immunity and confer jurisdiction to name solely the Attorney General. (Qatar Brief, pp. 17-18). A review of those cases shows that any reference to TPIA section 552.325 was incidental and not dispositive and that *none* of them are cases in which the party seeking to prevent disclosure named only the Attorney General. *See*, e.g., *Roane v. Paxton*, No. 14-18-00264-CV, 2020 WL 428861, *2 (Tex. App.—Houston [14th Dist.] Jan. 28, 2020, no pet.) (school superintendent seeking to prevent disclosure of sexual harassment investigation named both Attorney General and the Seguin Independent School District); *King v. Paxton,* 576 S.W.3d 881, 888 (Tex. App.—Austin 2019, pet. denied) (former legislator who sought to prevent disclosure of police body camera and dashboard camera video of mental wellness check named both the Attorney General and the City of Abilene); *ICON Benefit Adm'rs II,* 409 S.W.3d at 901 (third party seeking to prevent disclosure sued both Attorney General and the governmental body that held the information, the City of Lubbock); *Waste Mgmt. of Tex. Inc., v. Abbott*, No. D-1-GN-09-004107, 2010 WL 9035566 (Tex. Dist. (Trial Order), *rev'd* 406 S.W.3d 626 (Tex. App.—Eastland 2013, pet. denied) (Waste Management sought to prevent disclosure of waste tickets and named both the Attorney General and Williamson County); *Prop. Cas. Insurers Ass'n of Am. v. Tex. Dep't of Ins.*, No. 07-07-0057-CV, 2008 WL

4425520, at*1 (Tex. App.—Amarillo, Sep. 30, 2008, no pet.) (association seeking to prevent disclosure named both TDI and the Attorney General).

In *Parkview Nursing & Rehab. Ctr. v. Tex. Dep't of Aging & Disability Servs.,* No. 03-11-00480-CV, 2014 WL 5140377, at *4 (Tex. App.—Austin, Jan. 10, 2014, no pet.), Parkview sought injunctive and declaratory relief against the Department of Aging & Disability Services to prevent the disclosure to third parties of certain investigative reports covered by particular statutes. *Id.* The Attorney General was not made a party, nor was a decision of the Attorney General at issue. Although the decision does contain a "see" cite to TPIA section 552.325, the case did not arise or otherwise reference the TPIA. *See id.*

Likewise, *In re Tex. Dep't of Pub. Safety*, 416 S.W.3d 912 (Tex. App.—Dallas 2013, orig. proceeding), was not a TPIA case. The DPS sought a writ of mandamus when the trial court in Grayson County ordered the DPS to destroy a dashboard video of a drunk driving arrest. *Id.* at 913. The court of appeals merely noted that the real party in interest, the criminal defendant, had filed a lawsuit in Travis County to prevent the disclosure of part of the video the Attorney General opined should be released. *Id.* The case does not indicate who the parties in the Travis County case were—in specific, whether the DPS had been made a party.

As noted above, in *ICON Benefit Adm'rs II*, the third party seeking to prevent disclosure named as defendants both the Attorney General and the governmental body that held the information, the City of Lubbock. 409 S.W.3d at 901. In addition, the case is interesting in that the plaintiff had apparently referenced both TPIA sections 552.3215 and 552.325 as the basis for the lawsuit.

In only one of the eight cases referenced by Qatar was there a challenge to the trial court's jurisdiction. (Qatar Brief, p. 17 (citing *State Fair of Tex. v. Riggs & Ray, P.C.,* No. 05-15-00973-CV, 2016 WL 4131824 (Tex. App.—Dallas Aug. 2, 2016, no pet.)). That case is inapposite. In *State Fair*, on behalf of a client, the law firm Riggs & Ray made a TPIA request to the State Fair of Texas. *Id.* at *1. The State Fair filed a declaratory judgment lawsuit in Dallas County against the law firm, asserting that the State Fair was not a governmental body under the TPIA and had no duty to respond to the request. *Id.*

Riggs & Ray asserted TPIA section 552.325 *as a defense*, since it prohibits governmental bodies from naming the TPIA requestor as a party. *Id.* at *3. The trial court granted Riggs & Ray's plea to the jurisdiction. *Id.* at *1. The court of appeals reversed, stating "we do not agree section 552.325(a) applies to SFT's suit." *Id.* The court of appeals found that the

SFT could seek a declaration regarding the preliminary question of the applicability of the TPIA *despite* section 552.325, not because of it. *Id.* at *4.[8]

As a result, none of the cases relied on by Qatar as a "settled body of law" stands for the proposition that TPIA section 552.325 confers jurisdiction to name only the Attorney General.

IV. The Attorney General Lacks The Authority To Waive Sovereign Immunity.

Alternatively, Qatar asserts that "it [is] the **State's** prerogative to raise a sovereign immunity defense." (Qatar Brief, p. 22, emphasis in original). The fact that the Attorney General failed to file its own plea to the jurisdiction and later agreed that Qatar could maintain the underlying lawsuit is legally inconsequential. The Attorney General cannot waive sovereign immunity any more than a private party; waiver of immunity requires clear legislative action.

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[8] In *Morales v. Ellen*, 840 S W2d 519 (Tex. App.—El Paso, 1992, writ denied), a third party, Ellen, sued to prevent disclosure of information he contended was protected by privacy. The Attorney General intervened and claimed that Ellen may only file such a lawsuit pursuant to section 552.325. The court disagreed: "The trial court, thus, had jurisdiction to hear Mr. Ellen's suit raising violation of constitutional rights. Although the Act requires that a governmental body seeking to avoid disclosure must file suit for declaratory judgment or mandamus action in Travis County, there is no such requirement imposed upon a private citizen seeking review of an attorney general's decision." 840 S.W.2d at 523. In contrast, the Qatar Foundation did not establish constitutional claims and cannot rely on 552.325 instead.

In fact, the Legislature has recognized this inescapable conclusion. Section 402.004 of the Texas Government Code provides that:

> An admission, agreement, or waiver made by the attorney general in an action or suit to which the state is a party does not prejudice the rights of the state.

TEX. GOV'T CODE § 402.004.

The genesis of section 402.004 is in the common-law doctrine of sovereign immunity. *Emps. Ret. Sys. of Tex. v. Bass*, 840 S.W.2d 710, 714, n. 2 (Tex. App.—Eastland 1992, no writ). Unlike the common law doctrine, however, section 402.004 is not an affirmative defense that can be waived. *Id.* In *Department of Public Safety v. Great Southwest Warehouses, Inc.*, 352 S.W.2d 493, 494 (Tex. Civ. App.—Austin 1961, writ ref'd n.r.e.), the court found that section 402.004 prevents the Attorney General from waiving sovereign immunity. *Id.* (construing section 402.004's predecessor statute); *see also Tex. Dep't of Human Servs. v. Green,* 855 S.W.2d 136 (Tex. App.—Austin 1993, writ denied) (collecting cases under section 402.004) (superseded by statute on other grounds).

The *Department of Public Safety v. Great Southwest* case addressed a case in which the assistant attorney general representing the Department and the other officials named stated during argument that

> the failure to raise the fundamental issue of the State's immunity from suit by pleas in abatement and to the jurisdiction in the Trial

> Court was because appellants had requested that the State's right to immunity from suit should not be raised or pleaded.

352 S.W.2d at 494.

The court of appeals noted that "[a] waiver of the right of State immunity from suit by failure to assert it, is equivalent to an affirmative grant and consent to be sued, which is purely a legislative prerogative." *Id.* at 495. The court held that the Attorney General may not waive sovereign immunity because it would be a usurpation of the Texas Legislative's prerogative in violation of article II, section 1, of the Texas Constitution, the separation of powers provision. *Id.*; *cf. Terrazas v. Ramirez,* 829 S.W.2d 712, 722 (Tex. 1991) (setting aside final judgment based on lack of evidence rather than based on settlement agreement by Attorney General regarding constitutionality of apportionment statute). The courts, as a part of the judicial branch, may not approve such a violation of the separation of powers provision.

Qatar suggests that the Texas Supreme Court's decision in *Engelman* supports its position that there is no basis for a sovereign immunity challenge in this case. (Qatar Brief, pp. 22-23). That reliance is misplaced. In *Engelman,* the Court held that a governmental judgment debtor could not use sovereign immunity, raised post-judgment, to collaterally attack a final judgment to prevent collection by the judgment creditor. *Engelman*,

514 S.W.3d at 750–754 In other words, sovereign immunity is not an absolute bar to jurisdiction.

Certainly, the judicial branch retains the authority and responsibility to determine whether immunity exists in the first place and to define its scope. *Hillman*, 579 S.W.3d at 360. But the Texas Supreme Court has declined the invitation to abrogate the doctrine:

> Having existed for more than six hundred years, the governmental-immunity doctrine is "an established principle of jurisprudence in all civilized nations." *Mexia* 197 S.W.3d at 331 (quoting *Beers v. Arkansas,* 61 U.S. 527, 529, 20 How. 527, 15 L.Ed. 991 (1857)). We first recognized it as a principle of Texas law more than 170 years ago. *See Hosner v. DeYoung*, 1 Tex. 764 (1847). ("[N]o state can be sued in her own courts without her consent, and then only in the manner indicated by that consent."). Although the justifications for its existence have evolved through the years, we have steadfastly retained it in modern times precisely because it shields "the public from the costs and consequences of improvident actions of their governments," *MexiaMexia*, 197 S.W.3d at 332, and ensures that the taxes the public pays are used "for their intended purposes," *Reata [Const. Corp. v. City of Dallas*], 197 S.W.3d [371,] 375 .(Tex. 2006).
>
> We are not blind to the truism that, "just as immunity is inherent to sovereignty, unfairness is inherent to immunity." *City of Galveston v. State*, 217 S.W.3d 466, 480 n.38 (Tex. 2007) (Willett, J., dissenting). But as the Court's majority explained in that case, we resolve that concern by deferring to the legislature, as the policy-making branch of government, "to decide whether and to what extent that immunity should be waived." *Id.* at 472–73.

Id. at 361–362; *see also Engelman,* 514 S.W.3d at 753 ("[T]he decision to waive sovereign immunity is largely left to the legislature").

The courts have found that waivers of immunity can occur through the conduct of governmental bodies. In *Federal Sign v. Texas Southern Univ.,* 951 S.W.2d 401, 408, n. 1 (Tex. 1997) (superseded by statute as stated in *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004)), the Texas Supreme Court stated in a footnote that spawned dozens of cases that the state could waive immunity by its conduct. Later, in *Reata* the Court held that governmental immunity does not bar counterclaims asserted against a governmental entity that "interjects itself into or chooses to engage in litigation to assert affirmative claims for monetary damages," to the extent the counterclaims serve only to offset any such damages. 197 S.W.3d at 375 In *Engelman*, the Court held that sovereign immunity does not "so implicate subject-matter jurisdiction that it allows collateral attack on a final judgment." 514 S.W.3d at 751. In *State ex rel. Best v. Harper,* 562 S.W.3d 1, 19–20 (Tex. 2018), the Court held that immunity does not extend to counterclaims for attorney's fees under the Texas Citizens Participation Act.

That is not the same thing, however, as allowing the Attorney General to waive immunity by agreement by declining to file a plea to the jurisdiction. Sovereign immunity is a judicially created doctrine that can be interpreted and limited by the courts' inherent powers. As part of the

executive, the Attorney General, like state agencies, has only the powers granted expressly in the Texas Constitution and Texas statutes, along with those powers reasonably implicated from express powers. Even if the Attorney General has good policy reasons to do so, the decision of who may be sued under the TPIA and for what is a decision for the Texas Legislature. *See League of United Latin Am. Citizens, Council No. 4434, v. Clements,* 999 F.2d 831, 840 (5th Cir. 1993) (Attorney General cannot bind state agencies to his policy decisions). For these reasons, the trial court did not err in declining to defer to the Attorney General's position on jurisdiction.

V. Qatar Did Not Plead Viable *Ultra Vires* Claims.

In a footnote, Qatar suggests that a waiver of immunity is not required because "[t]here is no immunity for an Attorney General's decision to disclose information that violates the TPIA or exceeds the authority delegated by the Act. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009)." (Qatar Brief, pp. 21-22, fn. 4). The Attorney General, however, clearly has the authority to issue legal opinions under the TPIA. § 552.306. In fact, he has a mandatory duty to do so. *Houston Chronicle v. Mattox*, 767 S.W.2d 695, 698 (Tex. 1991).

What the Attorney General does under the TPIA is issue legal opinions. § 552.306. Although the TPIA decisions of the Attorney General

are entitled to be given "great weight" by the courts, they are purely advisory and do not bind the parties "in their legal and equitable interests." *City of San Antonio v. Texas Att'y Gen.*, 851 S.W.2d 946, 950 (Tex. App.—Austin 1993, writ denied); *see also Hart v. Gossum,* 995 S.W.2d 985, 963 (Tex. App.—Fort Worth 1999, no pet) (superseded by statute on other grounds) (declining to follow Attorney General's TPIA decision as not binding); *City of Garland v. Dallas Morning News*, 969 S.W.2d 548, 554–555 (Tex. App.—Dallas 1998), *aff'd*, 22S.W.3d 551 (Tex. 2000) (noting that, although attorney general's opinions are entitled to due consideration, they are not binding on courts). TPIA decisions are not adjudications—they reflect what the Attorney General believes to be the correct legal decision on the applicability of TPIA exemptions to required public disclosure.

To assert a valid *ultra vires* claim, the plaintiff "must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act." *Creedmoor-Maha*, 307 S.W.3d at 517–518 (citing *Heinrich*, 284 S.W.3d at 372). If the plaintiff alleges only facts demonstrating acts within the officer's legal authority and discretion, the claim seeks to control state decision making, and is barred by sovereign immunity. *See id.* at 516 (citing *Heinrich*, 284 S.W.3d at 372 and *McLane*

Co. v. Strayhorn, 148 S.W.3d 644, 650–651 (Tex. App.—Austin 2004, pet. denied)).

For example, in *Creedmoor-Maha*, the plaintiff alleged that the TCEQ reached an incorrect or wrong result when exercising its delegated authority, not facts showing that the Commission exceeded that authority. *Id.* at 516. The court deemed those allegations insufficient to sustain the court's inherent jurisdiction over *ultra vires* claims. *Id.* at 516 (*citing N. Alamo Water Supply Corp. v. Tex. Dep't of Health*, 839 S.W.2d 455, 459 (Tex. App.—Austin 1992, writ denied) ("The fact that the [agency] might decide 'wrongly' in the eyes of an opposing party does not vitiate the agency's jurisdiction to make [the] decision.")); *see also Henry v. Cox*, 520 S.W.3d 28, 36 (Tex. 2017) ("[T]he district court may order the commissioners court to exercise its discretion, but cannot tell the commissioners what decision to make.")

The same considerations apply here. The Attorney General clearly has the authority to issue legal opinions under the TPIA. The fact that Qatar may believe that one such legal opinion is wrong does not establish a proper *ultra vires* claim. An aggrieved party may compel the Attorney General to exercise his discretion, *see, e.g., Houston Chronicle*, 767 S.W.2d at 698, but it may not control the resulting decision.

VI. Texas A & M Is An Indispensable Party And Was Not Joined In The LawsuitLawsuit.

A. *Rule 39 requires the joinder of indispensable parties.*

Texas A & M is an indispensable party to a lawsuit to prevent the disclosure of information held by Texas A&M. Texas Rule of Civil Procedure 39 provides in part as follows:

> (a) a person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

TEX. R. CIV. P. 39(a).

The trial court cannot give complete relief without the presence of Texas A & M. Under section 552.201 of the TPIA, the chief administrative officer of a governmental body is the "officer for public information" with the duty to comply with the TPIA, including producing or withholding information and seeking an advisory opinion from the Attorney General under section 552.301 of the TPIA if the officer wishes to withhold the requested information. It is the officer for public information, not the Attorney General, that has the duty to produce public information.

§ 552.203(1); *see also* § 552.353 (officer for public information subject to criminal penalty for failing to release public information).

In contrast, a decision against the Attorney General cannot give the relief sought by Qatar. Nor could such a decision make Zachor, the requestor under the TPIA, whole. Governmental bodies submit information, or representative samples of the information at issue, to the Attorney General for his review in issuing a decision under section 552.306. § 552.301(e)(1)(D). But the Attorney General does not have any responsibility to actually disclose information. In fact, he is prohibited from doing so. § 552.3035. Much like a court that reviews information in camera to determine claims of privilege—the court does not release the information, the court orders the party withholding the information to do so.

Under the TPIA, however, the Attorney General cannot "order" the governmental body to release the information. He may only issue an advisory opinion under section 552.306. As indicated above, his advisory opinions are entitled to due consideration but they are not binding on the courts *Tex. Att'y Gen.*, 851 S.W.2d at 950; *see also Hart,* 995 S.W.2d at 963); *City of Garland*, 969 S.W.2d at 554–555.

Nor are the Attorney General's decisions self-enforcing. Certainly, the Attorney General may seek to enforce his opinions in court. The TPIA expressly authorizes the Attorney General to do so under TPIA section 552.321 by seeking a writ of mandamus against a governmental body to compel compliance with his opinions. § 552.321. In addition, if the county or district attorney declines to seek declaratory or injunctive relief under TPIA section 552.3215, the Attorney General may pursue a declaratory judgment and/or injunctive relief against the governmental body. § 552.3215(i). As noted, when the Attorney General seeks to enforce the TPIA to prevent or cure a violation, he must name the governmental body in the lawsuit. § 552.3215.

A lawsuit in which Qatar obtains relief only against the Attorney General also places all parties at risk of multiple lawsuits and inconsistent results. Since Texas A & M is not a party, it would not be bound by any decision. If Texas A & M subsequently failed to release the information, Zachor would have to pursue relief under section 552.321 against Texas A & M to compel disclosure. Conversely, if Texas A & M made the decision to release the information, Qatar would be in the position of having to seek an injunction against Texas A & M to prevent disclosure. And three is no assurance the Brazos County District Court would reach the same

conclusion as that reached by the Travis County District Court. These possibilities are the kinds of things Rule 39 was designed to prevent.

For example, in *Henry*, the plaintiff, a district judge, challenged a decision of the county judge, as head of the Galveston County Commissioners Court, over the termination of a judicial administrative employee. 520 S.W.3d at 33. Although the county judge had acted unilaterally, the Texas Supreme Court held that the relief requested, reinstatement, required action by the commissioners court. *Id.* at 35 As a result, "the other commissioners, or at least the Commissioners Court, were indispensable parties." *Id.* at 36. The failure to name them deprived the trial court of authority to bind them. *Id.* The Court addressed the issue as one of subject-matter jurisdiction. *See id.* at 35; *see also Flour Bluff Indep. Sch. Dist. v. Bass,* 133 S.W.3d 272, 274 (Tex. 2004) (naming Texas Association of School Boards and failing to timely add the school district deprived trial court of jurisdiction); *State Office of Risk Mgmt. v. Herrera*, 288 S.W.3d 543, 549 (Tex. App.—Amarillo 2009, no pet.) (State Office of Risk Management's naming of the Texas Municipal League instead of the City of Friona deprived the trial court of jurisdiction.).

B. *If an indispensable party is joined too late, the trial court lacks subject matter jurisdiction.*

Section 552.324 of the TPIA provides consequences for the failure of Texas A & M to file a lawsuit to challenge the Attorney General's decision:

> (b) The governmental body must bring the suit not later than the 30th calendar day after the date the governmental body receives the decision of the attorney general determining that the requested information must be disclosed to the requestor. *If the governmental body does not bring suit within that period, the governmental body shall comply with the decision of the attorney general.* If a governmental body wishes to preserve an affirmative defense for its officer for public information as provided in Section 552.353(b)(3), suit must be filed within the deadline provided in Section 552.353(b)(3).

§ 552.324 (emphasis added).

Texas A & M did not file a lawsuit in this matter. Nor did Texas A & M seek to intervene in the lawsuit filed by Qatar. The Qatar Foundation did not bring Texas A & M in as a party, whether as defendant or as involuntary plaintiff. It is also undisputed that the 30 day deadline for Texas A & M to have filed a lawsuit to challenge the decision of the Attorney General under section 552.324 had long since passed when the trial court considered Zachor's plea to the jurisdiction. As a result, Texas A & M has a mandatory duty to release the information ruled public in Tex. Att'y Gen. OR2018-20240. *See Thomas v. Cornyn*, 71 S.W.3d 473, 482 (Tex. App.—Austin

2002, no pet.) (absent lawsuit by governmental body, information must be released).

In the *Flour Bluff Independent School District* case, Bass, an employee of the district, sought judicial review of an adverse workers compensation decision through a suit filed solely against the Texas Association of School Boards (TASB), as defendant. 133 S.W.3d at 273. TASB was the third-party administrator of workers' compensation benefits for the Flour Bluff Independent School District. *Id.* The trial court granted summary judgment on the ground of limitations because the proper defendant was Flour Bluff, who Bass joined in an amended pleading filed outside the applicable limitations period. *Id.* at 273. The court of appeals reversed, finding limitations were tolled when Bass mistakenly named TASB. *Id.* at 274. The Texas Supreme Court disagreed, finding that Flour Bluff and TASB were two distinct parties and that Bass was required to sue Flour Bluff within the forty-day limitations period. *Id.*

The court of appeals opinion in *Herrera*, followed the *Flour Bluff* case and held that the State Office of Risk Management's (SORM's) naming of the Texas Municipal League (TML) instead of the City of Friona deprived the trial court of jurisdiction. *Herrera*, 288 S.W.3d at 549. The court of appeals found that the TML and the City were distinct entities that did not

justify finding a tolling on the basis of mistake. *Id.* The court declined to toll the forty-day time period of section 410.252(a) of the Texas Labor Code as of the date SORM sued the TML Risk Pool but not the City. *Id.* Because the City was not sued within the statutory forty-day period, the court found that the trial court did not err in dismissing, for lack of subject-matter jurisdiction, the City and TML *Id.*

Similar considerations apply here. The Attorney General issued Tex. Att'y Gen. OR2018-20240 on August 14, 2018. (CR 225-226; Appendix C). By the time Qatar filed the underling lawsuit on October 12, 2018 (CR 4-21), it was already too late to join Texas A & M in time to meet the thirty-day limitations period in TPIA section 552.324. The Attorney General of Texas and Texas A & M University are distinct state agencies. Moreover, it is undisputed that Qatar did not argue confusion or mistake as the reason it failed to name Texas A & M as a party and did not seek leave to add Texas A & M after Zachor raised a challenge to the trial court's jurisdiction. (CR 28-29). Qatar offered no reason for the omission other than its argument that TPIA section 552.325 authorized its lawsuit against the Attorney General. (CR 5).

As a result, the trial court did not err in dismissing Qatar's claims for lack of subject-matter jurisdiction. This Court need not reach the issue of

the scope of the waiver of sovereign immunity provided against the Attorney General in the TPIA. Should this Court do so, however, it is clear that the waiver of immunity in the TPIA for lawsuits against the Attorney General is only for lawsuits filed by governmental bodies and filed within the time allowed in section 552.324. Instead, lawsuits such as those filed by Qatar are subject to section 552.3215, which specifies that the lawsuit is to be filed against the governmental body that holds the requested information.

PRAYER

For these reasons, Appellee Zachor Legal Institute prays that the trial court dismissal of the lawsuit be affirmed and for such further relief, at law or in equity, to which it justly may be entitled.

Respectfully submitted,

RIGGS & RAY, P.C.

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limitations of TEX. R. APP. P. 9.4(i)(3) because this brief consists of 10,830 words as determined by Microsoft Word Count, excluding the parts of the brief exempted by TEX. R. APP. P. 9.4(i)(1).

/s/ Dale Wainwright
Dale Wainwright

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on counsel of record by using the Court's CM/ECF system on the 31st day of August 2020.

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Ken Paxton, Texas Attorney General

/s/ Dale Wainwright
Dale Wainwright

APPENDIX

TAB A

CAUSE NO. D-1-GN-18-006240

QATAR FOUNDATION FOR EDUCATION, SCIENCE AND COMMUNITY DEVELOPMENT, *Plaintiff,*	§	IN THE DISTRICT COURT OF
v.	§	200th JUDICIAL DISTRICT
KEN PAXTON, TEXAS ATTORNEY GENERAL, *Defendant,*	§	TRAVIS COUNTY, TEXAS

ORDER GRANTING PLEA TO THE JURISDICTION

On December 17, 2019, the Court heard Intervenor Zachor Legal Institute's Motion for Summary Judgment and alternative Plea to the Jurisdiction and the Plaintiff Qatar Foundation's Cross Motion for Summary Judgment in the above styled and numbered cause of action. The Court afforded the Plaintiff Qatar Foundation and the Defendant Attorney General the opportunity to submit responses to Zachor's Plea to the Jurisdiction after the hearing. After consideration of the pleadings, the cross motions for summary judgment, the competent summary judgment evidence, the plea to the jurisdiction, the arguments of all parties, and the applicable law, the Court has determined that it does not have jurisdiction over Plaintiff's claims.

IT IS, THERFORE, ORDERED that Intervenor Zachor's Plea to the Jurisdiction shall be and is hereby GRANTED and that this case shall be and is hereby dismissed for lack of jurisdiction.

Signed this 17th day of January, 2020.

The Honorable Karin Crump,
Judge Presiding

APPROVED AS TO FORM AND SUBSTANCE:

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TAB B

B001108-052318 - Public Information Records

Public Information Records Details

This request is for:	Texas A&M University
Summary of Request:	A summary of all amounts of funding or donations received by or on behalf of the University from the government of Qatar and/or agencies or subdivisions of the government of Qatar between January 1, 2013 and May 22, 2018.

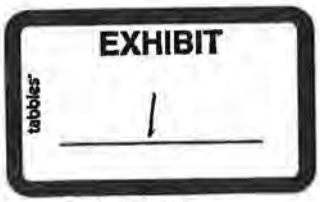

EXHIBIT A
Greendorfer (B001108-052318)

Describe in detail the Record(s) Requested:

A summary of all amounts of funding or donations received by or on behalf of the University of Michigan from the government of Qatar and/or agencies or subdivisions of the government of Qatar between January 1, 2013 and May 22, 2018.

For purposes of this request, please include the following individuals and entities as being affiliated with the government of Qatar:

Individuals:
Tamim bin Hamad Al Thani;
Hamad bin Khalifa bin Hamad bin Abdullah bin Jassim bin Mohammed Al Thani;
Jawaher bint Hamad bin suhaim;
Al Mayassa bint Tamim bin Hamad Al Thani;
Hamad bin Tamim bin Hamad Al Thani;
Jassim bin Tamim bin Hamad Al Thani;
Aisha bint Tamim bin Hamad Al Thani;
Anoud bint Mana Al Hajri;
Naylah bint Tamim bin Hamad Al Thani;
Abdullah bin Tamim bin Hamad Al Thani;
Rodha bint Tamim bin Hamad Al Thani;
Al-Qaqa bin Tamim bin Hamad Al Thani;
Noora Bint Hathal Aldosari;
Joaan bin Tamim bin Hamad Al Thani;
Mohammed bin Tamim bin Hamad Al Thani;
Abdullah bin Nasser bin Khalifa Al Thani;
Ahmad bin Abdullah Al Mahmoud;
Ashraf Muhammad Yusuf 'Uthman 'Abd al-Salam;
Abd al-Malik Muhammad Yusuf 'Uthman 'Abd al-Salam;
Mubarak Alajji;
Sa'd bin Sa'd al-Ka'bi;
Abd al-Latif bin 'Abdallah al-Kawari;
Abu Abdulaziz al-Qatari;
Mohammad Bin Saleh Al-Sada;
Saad Sherida Al-Kaabi;
Abdullah Mohd Essa Al-Kaabi;
Faisal Bin Qassim Al-Thani;
Kamel El-Agela;
Fatma Al Remaihi;
Hind bint Hamad Al Thani;
Sould Al-Tamimi;
Richard O'Kennedy ;
Ilias Belharouak;
Sabah Ismail Al-Haidoos; and
Faisal Mohammad Al-Emadi

Entities:
- Qatar Ministry of Foreign Affairs
- Qatar Minister of State for Foreign Affairs
- Qatar Minister of Defense
- Qatar Minister of the Interior
- Qatar Ministry of Public Health
- Qatar Ministry of Energy and Industry
- Qatar Ministry of Municipal and Urban Planning
- Qatar Ministry of Environment
- Qatar Ministry of Finance
- Qatar Ministry of Culture, Arts and Heritage
- Qatar Ministry of Labor and Social Affairs
- Qatar Ministry of Education and Higher Education
- Qatar Ministry of Awqaf and Islamic Affairs
- Amiri Diwan – Sheikh Abdullah bin Khalifa Al Thani
- Qatar Investment Promotion Department
- Qatar Supreme Council for Family Affairs
- Qatar Supreme Judiciary Council
- Al Jazeera Media Network, including the following subsidiary organizations:
- News- Al Jazeera Arabic
- Al Jazeera English
- Al Jazeera Mubasher Al-'Amma
- Al Jazeera Balkans (Balkans)
- Sports- beIN Media Group
- Educational- Al Jazeera Documentary Channel
- JeemTV

EXHIBIT A
Greendorfer (B001108-052318)

- Other- AJ+
- Aljazeera.com
- Jetty
- Al Jazeera Mobile
- Al Jazeera New Media
- Al Jazeera Center for Studies
- Al Jazeera International Documentary Film Festival
- beIN Media Group
- Miramax Films

Qatar Petroleum
Sidra Medical and Research Center
RasGas Company Limited
Al Faisal Holding Co
Doha Film Institute
Qatar Environmntl & Energy Res Inst
Silatech
Qatar Airways
Qatar National Research Fund
Jasoor Institute
Qatar Foundation
Qatar University
Hamad Medical Corporation
Qatar Biomedical Research Institute
Construction Development Co LLC
Qatar Leadership Center
Ooredoo
Maersk Oil Qatar
Aramco Services co
Qatar Computing Research Institute
Education Above All
Al Fakhoora
Qatar Charity

Please also include any funding received from the above sources by or on behalf of student groups affiliated with, or operating with the consent of, the University.

Preferred Method to Receive Records:	Electronic via Records Center

Category

Clarification(s)

OAG decision requested

Exceptions

Charges

Message History

Request Details

Reference No:	B001108-052318
Create Date:	5/23/2018 5:40 PM
Update Date:	5/24/2018 5:11 PM
Completed/Closed:	No
Required Completion Date:	6/8/2018

EXHIBIT A
Greendorfer (B001108-052318)

Status:	Activity Assigned
Priority:	Medium
Assigned Dept:	TAMU_Open Records
Assigned Staff:	Open Records University
Customer Name:	Attorney Marc Greendorfer
Email Address:	info@zachorlegal.org
Phone:	6502799690
Group:	TAMU
Source:	Web

EXHIBIT A
Greendorfer (B001108-052318)

TAB C

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 14, 2018

Ms. Julie A. Masek
Assistant General Counsel
The Texas A&M University System
301 Tarrow Street, 6th Floor
College Station, Texas 77840-7896

OR2018-20240

Dear Ms. Masek:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 723308 (B001108-052318).

Texas A&M University (the "university") received a request for information pertaining to certain funding or donations received for a period of time.[1] You claim some of the submitted information is excepted from disclosure under section 552.1235 of the Government Code. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.[2]

---

[1]We note the university sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

[2]We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

EXHIBIT
tabbies
3
12

Section 552.1235 of the Government Code excepts from disclosure "[t]he name or other information that would tend to disclose the identity of a person, other than a governmental body, who makes a gift, grant, or donation of money or property to an institution of higher education[.]" Gov't Code § 552.1235(a). For purposes of this exception, "institution of higher education" is defined by section 61.003 of the Education Code. *Id.* § 552.1235(c). Section 61.003 defines an "institution of higher education" as meaning "any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in this section." Educ. Code § 61.003(8). Because section 552.1235 does not provide a definition of "person," we look to the definition provided in the Code Construction Act. *See* Gov't Code § 311.005. "Person" includes a corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity. *Id.* § 311.005(2). You state the information you marked in the submitted information identifies donors to the university. Thus, the university must withhold the donors' identifying information, which you marked, under section 552.1235 of the Government Code. The university must release the remaining information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

D. Michelle Case
Assistant Attorney General
Open Records Division

DMC/gw

Ref: ID# 723308

Enc. Submitted documents

c: Requestor
(w/o enclosures)

TAB D

Vernon's Texas Statutes and Codes Annotated
Government Code (Refs & Annos)
Title 5. Open Government; Ethics (Refs & Annos)
Subtitle A. Open Government
Chapter 552. Public Information (Refs & Annos)
Subchapter H. Civil Enforcement

V.T.C.A., Government Code § 552.324

§ 552.324. Suit by Governmental Body

Effective: September 1, 2009
Currentness

(a) The only suit a governmental body may file seeking to withhold information from a requestor is a suit that:

(1) is filed in a Travis County district court against the attorney general in accordance with Section 552.325; and

(2) seeks declaratory relief from compliance with a decision by the attorney general issued under Subchapter G.[1]

(b) The governmental body must bring the suit not later than the 30th calendar day after the date the governmental body receives the decision of the attorney general determining that the requested information must be disclosed to the requestor. If the governmental body does not bring suit within that period, the governmental body shall comply with the decision of the attorney general. If a governmental body wishes to preserve an affirmative defense for its officer for public information as provided in Section 552.353(b)(3), suit must be filed within the deadline provided in Section 552.353(b)(3).

Credits

Added by Acts 1995, 74th Leg., ch. 1035, § 24, eff. Sept. 1, 1995. Amended by Acts 1999, 76th Leg., ch. 1319, § 30, eff. Sept. 1, 1999; Acts 2009, 81st Leg., ch. 1377, § 10, eff. Sept. 1, 2009.

Footnotes

1 V.T.C.A., Government Code § 552.301 et seq.

V. T. C. A., Government Code § 552.324, TX GOVT § 552.324
Current through the end of the 2019 Regular Session of the 86th Legislature

End of Document

TAB E

Vernon's Texas Statutes and Codes Annotated
Government Code (Refs & Annos)
Title 5. Open Government; Ethics (Refs & Annos)
Subtitle A. Open Government
Chapter 552. Public Information (Refs & Annos)
Subchapter H. Civil Enforcement

V.T.C.A., Government Code § 552.325

§ 552.325. Parties to Suit Seeking to Withhold Information

Effective: September 1, 2009
Currentness

(a) A governmental body, officer for public information, or other person or entity that files a suit seeking to withhold information from a requestor may not file suit against the person requesting the information. The requestor is entitled to intervene in the suit.

(b) The governmental body, officer for public information, or other person or entity that files the suit shall demonstrate to the court that the governmental body, officer for public information, or other person or entity made a timely good faith effort to inform the requestor, by certified mail or by another written method of notice that requires the return of a receipt, of:

(1) the existence of the suit, including the subject matter and cause number of the suit and the court in which the suit is filed;

(2) the requestor's right to intervene in the suit or to choose to not participate in the suit;

(3) the fact that the suit is against the attorney general in Travis County district court; and

(4) the address and phone number of the office of the attorney general.

(c) If the attorney general enters into a proposed settlement that all or part of the information that is the subject of the suit should be withheld, the attorney general shall notify the requestor of that decision and, if the requestor has not intervened in the suit, of the requestor's right to intervene to contest the withholding. The attorney general shall notify the requestor:

(1) in the manner required by the Texas Rules of Civil Procedure, if the requestor has intervened in the suit; or

(2) by certified mail or by another written method of notice that requires the return of a receipt, if the requestor has not intervened in the suit.

(d) The court shall allow the requestor a reasonable period to intervene after the attorney general attempts to give notice under Subsection (c)(2).

Credits

Added by Acts 1995, 74th Leg., ch. 1035, § 24, eff. Sept. 1, 1995. Amended by Acts 2009, 81st Leg., ch. 1377, § 11, eff. Sept. 1, 2009.

V. T. C. A., Government Code § 552.325, TX GOVT § 552.325
Current through the end of the 2019 Regular Session of the 86th Legislature

End of Document

TAB F

SUBJECT: Revision of open records law

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 14 ayes — Seidlits, S. Turner, Alvarado, Black, Bosse, Carter, Craddick, Hilbert, Hochberg, B. Hunter, D. Jones, McCall, Ramsay, Wolens

0 nays

1 absent — Danburg

WITNESSES: For — Robert E. Lett; John Cranfill, Dallas Morning News and Open Records Steering Committee-Texas Media; Laura Peterson, Freedom of Information Foundation of Texas

Against — Donald Lee, Conference of Urban Counties

On — Jill Urban and Cathy Cunningham, City of Irving; Rebecca L. Payne, Office of the Attorney General; Hadassah M. Schloss, Open Records Steering Committee - General Services Commission.

BACKGROUND: The Open Records Act was enacted in 1973 to provide the broadest possible access to public information maintained or generated by governmental bodies in this state. In an effort to ensure that the governmental body was not overly burdened with the cost of producing these records to the public, the act allowed the governmental body to charge reasonable fees for information provided.

The act established a number of exceptions to what records would not be subject to public access. Whenever a question arises concerning the confidentiality of a particular record, the attorney general is the arbiter of the dispute and will determine whether a record may be released.

DIGEST: CSHB 1718 would change the Open Records Act to the Public Information Act and change all references from records to information.

Public information would be redefined to include information stored or produced through electronic means rather than simply physical or paper

records. When the information exists in an electronic medium, the requestor could request a copy by either that medium or on paper. So long as the governmental body has the technological capability to produce the information, has the software and hardware to do so, and would not violate copyright laws, the governmental body would have to provide the information in the form requested. The governmental body would be allowed to charge reasonable fees (set by General Service Commission rules) for programming, manipulation and processing of the records as well as the cost of the transfer or storage medium on which the material is placed.

If a governmental body determined that programming, manipulation or processing services were necessary to provide information by electronic means, it would have to give the requestor of the information an estimate regarding the cost of the records and the anticipated time needed to complete the request before proceeding with the information retrieval. If the cost of the request was greater than $100, the governmental body could request a bond or deposit be placed by the requestor before the information is retrieved.

The General Services Commission (GSC) would be directed to develop rules regarding the cost of providing information to the public. These rules would establish charges for any form of request as well as reasonable charges for personnel and overhead. All governmental bodies would be subject to the rules established by the GSC unless it petitioned to be exempted from the GSC rules and such an exemption was granted.

CSHB 1718 would also update rules relating to the confidentiality of material prepared in anticipation of litigation, and establish permanent confidentiality for attorney work product materials. CSHB 1718 would also incorporate the provisions of SB 360 by Armbrister, which became effective September 1, 1993, prohibiting general public access to library records that identify a person who requests specific information.

CSHB 1718 would permit a governmental body to ask a requestor to further specify what information is being requested or try to suggest ways of narrowing the requested amount, but the governmental body could not ask what the purpose of the information might be.

When a person only requests access to the information, not an actual copy of the information, CSHB 1718 provides for such access free of charge so long as the material does not need to be redacted to protect confidential information or processed, programmed or manipulated by electronic means.

If a member of the public felt that a governmental body had overcharged for copies of records, the person could complain of the overcharge to the GSC, which could investigate the problem. If it determined that the person was overcharged and the mistake was not made in good faith, the governmental body would be required to return the overcharge to the requestor of the information.

When a municipality collected Geographic Information System (GIS) data, it could charge a fee for access to such information related to the system operation costs, data collection costs, and the value of the information or it could provide the information free to the public. CSHB 1718 would establish a study to be conducted by the General Services Commission regarding GIS data services to be completed by September 30, 1996.

When a governmental body filed suit to retain the confidentiality of information requested, the suit would have to be filed against the attorney general. The requestor of the information would be given the right to intervene in the suit, but would not have to do so.

This bill would take effect September 1, 1995.

SUPPORTERS SAY:

Public access to information maintained by the government is an essential right in an open democracy. The public must have the ability to obtain information from their government in a convenient way and at a reasonable cost. Taxpayers have a right to this information because they paid to have information created or collected. New technologies have emerged over the last ten years, and many continue to emerge daily that make the public's ability to process and receive information much easier. Such technology has increased the public's appetite for access to all sorts of information.

The primary problem with the current Open Records Act is that is was created in a time when the transmission and storage of records through electronic media was not the standard method used. Now that almost every

record that a governmental body has is kept in some form on electronic media, the Open Records Act must be updated to conform with these changes. To that end, an interim subcommittee was established to review and revise the Open Records Act. The subcommittee included members of the media, the Attorney General's Office, State Comptroller's Office, GSC, and the Freedom of Information Foundation as well as others. That committee recommended most of the revisions that would be made by CSHB 1718.

Pursuant to HB 1009, enacted by the 73rd Legislature, the General Services Commission promulgated a set of rules for determining the cost of providing information to the public. The problem is that these rules are being used only as a guideline and only for state governmental bodies. The interim committee suggested making these rules mandatory for all governmental units in order to standardize the costs for open records requests. Currently, a person seeking information that is held by several different governmental bodies may be forced to pay radically different costs depending on where the information is located. The rules developed by the GSC are not based solely on the cost for state government to produce records, but represent an average between how much it costs for the government to produce such records and what the cost is through private companies.

At the request of members of the media, all requestors of information are treated equally regarding access to public information and the cost of receiving such information. CSHB 1718 would not establish any categories for classes of requestors or make any distinctions based on how they might be using the information.

A great deal of attention was given to how these records, especially when on electronic media, might be used for commercial purposes. Several proposals were made to find a way to ensure that those using the records for commercial purposes were set apart from those using the records for informational purposes. However, the privacy problems associated with asking requestors the purpose of the information that they request left only one option: treating everyone equally.

CSHB 1718 incorporates provisions of SB 636 by Henderson which passed the Senate on March 8. SB 636 relates to the ability of a governmental body to sue the requestor of the information. This legislation was prompted by an incident in which the parent of a student requested information regarding a teacher's evaluations of his child. After an unfavorable ruling by the Attorney General's Office, the district sued the parent to establish the confidentiality of the records. The requestor of a public record should never have to defend such a suit.

OPPONENTS SAY:

Counties and cities should not be subjected to the same rules adopted by the GSC for state agencies regarding the costs of open records. These rules should be only guidelines for non-state governmental bodies. The GSC has no experience with local governments and no representatives of local government were involved in the process of making the rules for costs.

The problem with the rate-setting process is that the costs for creating such records, especially computer records, varies greatly from one governmental body to another. For example, in one large metropolitan county, the records may already be on a sophisticated database system and the county may already employ a full-time programmer or data assembler who can manipulate the records very easily. In more rural counties, however, the records might placed into a computerized database, but in order to manipulate the data to remove confidential information, or to simply put it into a form that the requestor can use, might involve contracting out to commercial programmers or having the people who work with the system learn the procedures. Either way, the actual cost of fulfilling the request will be substantially higher than the charge allowed by the GSC.

NOTES:

The committee substitute clarified the confidentiality of records maintained in anticipation of litigation, makes corrective changes to conform with changes made to the Open Records Act by the 73rd Legislature, and adds the language concerning GIS data.

SB 1373 by Wentworth, an identical bill to HB 1718, is pending in the Senate State Affairs committee. SB 636 by Henderson, containing the provision prohibiting suits by governmental bodies against individual requestors, passed the Senate on March 8 and was left pending in the House State Affairs Committee.

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